Are ED Policies Inflexible?

Very simple changes can avoid legal problems

After noting a violation of ED policy, the plaintiff attorney typically tells the jury that by failing to follow the ED policy, the EP defendant breached the standard of care.

"The defense is left to explain that the ED policy is not the standard of care. It puts the burden on the defense when it ought to rest with the plaintiff," says **Andy Walker**, MD, FAAEM, a Nashville, TN-based EP.

During malpractice litigation, plaintiff attorneys frequently bring up the fact that an ED policy wasn't followed to the letter. "EDs draft policies and procedures at their peril," says **William M. Mandell**, JD, an attorney at Pierce & Mandell in Boston, who frequently advises hospitals and medical groups on health law and compliance.

Compliance with ED policies, on the other hand, can provide a strong defense for EPs. "If you followed your policy, and your policies are reasonable, that can bolster a defense that you acted in a compliant fashion with any external mandates and that you complied with the standard of care," Mandell says.

ED policies are "neither a perfect sword nor a perfect shield," says **Gregory Dolin**, MD, JD, co-director of the Center for Medicine and Law in Baltimore. "If the policy says you should do A, and for some reason you didn't do it, it doesn't mean you committed malpractice."

The policy may not be applicable to a particular patient; what the EP did could have been reasonable even though there was a bad outcome. "The burden is on the EP to explain why the policy was not followed," Dolin says. "The jury may be skeptical and think, 'Maybe you screwed up.'"

Walker says that in his experience reviewing ED charts as an expert witness for the defense, there are two problems with ED policies. "One is that no one ever reads them — except when you are first hired, or when someone is trying to get someone else in trouble," he says.

The second problem is that ED policies are often too specific or rigid. Sometimes, this is due to hospital administrators and risk managers trying to cover every possible scenario. "These are people who either have never done patient care, or if they were involved, it was many years ago," Walker says. Poorly drafted ED policies may be well-intentioned, he adds, but often backfire on EPs who find themselves defendants in malpractice cases. "I continually see plaintiff attorneys trying to use policies against the EP and against the hospital," Walker notes.

Here are some reasons why ED policies can complicate an EP's defense in malpractice litigation:

• If ED policies have additional requirements than the law requires, the failure to follow the ED policy can be introduced as evidence of negligence.

EDs should constantly be reviewing and modifying policies as warranted in response to changes in regulations or legislative rulings, Mandell says.

• If ED policies leave no room for clinician discretion, the plaintiff attorney can make an issue of the fact that policies weren't followed to the letter.

"It is a real challenge for counsel and clinical and administrative leadership to make sure policies are carefully drafted," Mandell says. "You want to be clear and complete, but leave some level of discretion and flexibility."

If a policy doesn't leave room for the clinician's discretion, this raises the EP's legal exposure. "You can be arguably compliant with the law, but you didn't follow your own policy and procedure — and that is what creates the exposure," Mandell explains.

For example, an ED's Emergency Medical Treatment and Labor Act (EMTALA) policy can include some level of discretion as to when patients can be transferred. "If the policy is not artfully drafted, you can act in a clinically appropriate way and an EMTALA-compliant way, but still in contrary to your policy," Mandell says.

ED policies should be "short, general, and flexible, and give as much wiggle room as they can," says Walker, in order to leave as much room for the EP's individual professional judgment as possible.

"Not only is that better for patients, but it can be a defense for EPs at trial. It gives them a chance to explain why they did what they did," Walker says.

Walker suggests this wording for transfer policies: "in compliance with applicable laws and regulations and in accordance with professional judgment and medical ethics."

For ED policies on consent, Walker suggests this wording: "ED personnel should consider the possibility of implied consent in anyone who presents to the ED, and exercise professional judgment in evaluating a patient's competence to make treatment decisions."

Walker says ED policies should avoid words such as "shall" and instead, use phrases such as "should consider" and "based on professional judgment applied to the individual patient's condition."

Walker has seen plaintiff attorneys allege that ED nurses failed to follow the ED's policy requiring repeat vital signs to be obtained at specific intervals, such as every 15 minutes, on a patient who appears to be stable but eventually has a bad outcome.

"The plaintiff's attorney then accuses the ED nurse of negligence as a way to bring the hospital into the case as a defendant, with its deep pockets," Walker says. "They do this in case their attempt to make the hospital a defendant under the doctrine of 'apparent agency' fails, assuming the EP is not a hospital employee."

Instead of giving a specific timeframe, Walker says to use wording such as "as often as professional judgment indicates and practical circumstances allow."

Walker also sees ED policies wielded as a weapon by the plaintiff in malpractice cases involving falls, fall precautions, and fall risk rating scores. "In real time, the ED nurse will rate a patient's risk of fall at one score," he explains. After the fact, the plaintiff's attorney will argue the score was miscalculated according to the hospital's policy and procedure manual.

"Writing too much detail into a policy book is always foolish and dangerous, and will eventually come back to bite you," Walker warns.

• ED policies are sometimes inconsistent with other hospital policies that address similar or identical areas.

"ED policies should not be drafted in a vacuum. You should be looking at the entire collection of policies within a hospital," Mandell says.

• Some EDs lack policies that are required by federal law.

EDs are required to have certain policies under the Center for Medicare & Medicaid Services' Conditions of Participation, and as a condition of licensure under state licensing rules.

"If under one of those authorities you fail to have a policy where you were required to do so, the evidence of the lack of the policy can be used to support claims of both facility and provider negligence," Mandell warns. ■

SOURCES

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CME/CNE QUESTIONS

1. Which is recommended to reduce diagnostic errors in the ED setting?

A. Having physician and nursing notes in two different workflows in EMRs could reduce the risk of diagnostic errors.
B. Callbacks of patients discharged with uncertain diagnosis are unnecessary for the vast majority of cases.
C. EPs should be more involved in quality assurance efforts.
D. EDs should generally not examine suspected diagnostic errors, to avoid legal discoverability, if a formal root cause analysis is not possible.

2. Which is true regarding an EP's defense in a misdiagnosis claim?

A. EPs should generally avoid documenting conditions that were considered and ruled out.
B. ED charts should include not only the pertinent positives, but also the pertinent negatives.
C. Documentation of informal consultations increases legal risks for both the EP and the consultant.
D. An explanation of why a diagnostic test wasn't ordered increases the EP's legal exposure.

3. Which is true regarding ED obstetric patients and EMTALA?

A. If a pregnant patient wishes to leave the ED and go to a different hospital, EMTALA requires the EP to override the patient's wishes.
B. The on-call consultant can refuse to come to the ED if he or she disagrees about the level of risk to the patient.
C. EMTALA includes no additional protections for pregnant patients.
D. An "emergency medical condition" as defined by EMTALA includes any pregnant woman having contractions.

4. Which is recommended for ED policies to reduce an EP's legal exposure?

A. ED policies should give specific time frames for how often vital signs should be checked.
B. ED policies should leave ample room for the individual EP's discretion.
C. EMTALA policies should not include any level of discretion for when patients can be transferred.
D. ED policies should be referred to as the legal standard of care.